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WILLS—CONTRACT TO DEVISE—ACTION TO ENFORCE—ADMINISTRATOR AS PARTY—ATTORNEY OF ADMINISTRATOR APPEARING FOR PLAINTIFF. *McCabe* v. *Healy,* 70 Pac. R. 1008 (1902).—This is a rather interesting case decided by the Supreme Court of California in 1902. The facts of the case are briefly as follows: Matthew Healy was engaged in the stock-raising business in California in the year 1881 and for many years prior thereto. He had no relatives in the United States. In 1881 he returned to his old home in Ireland to visit his sisters, having been away for thirty-seven years. The plaintiff, Ulty McCabe, was then a boy of fourteen years residing with his mother, Healy's sister, the father being dead. Healy took a fancy to the boy, and this led him to verbally agree with the boy and the boy's mother and guardian that if they would surrender the boy to his control and care, and if the boy would accompany him to California and there accept his care, instruction, and direction, and industriously learn and care for his (Healy's) busi-

ness, property, and interests as long as Healy lived, he would take good care of the boy, treat him as his son, and "upon his death he should have all property of every character wheresoever situated that Healy should own at the time of his death, and that he would will the boy all his estate." McCabe, the plaintiff, in accordance with this agreement accompanied Healy back to California, and the two there kept faith to the full letter of the understanding. The plaintiff managed Healy's interests well and substantially performed his part of the contract. Healy, however, died intestate. This was a suit against Healy's heirs-at-law for specific performance of the contract and to obtain a decree that the title of the property of Healy was in the plaintiff. The court considered that the plaintiff was equitably entitled to the estate and made a decree accordingly.

Such a case as this is not of infrequent occurrence and so the decision is of some importance. It raises many nice points and objections which are discussed at length by the judge in reaching his conclusion. It is well to review and consider them systematically.

1. *Right to make contract to devise.* This is unquestioned. In *Johnson* v. *Hubbel,* 10 N. J. Eq. 332 (1855), it is said: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual or for a particular purpose as well by will as by conveyance to be made at some specified future period or upon the happening of some future event." Pomeroy on Specific Performance is to the same effect, where it is expressed thus: "Courts of Equity will under special circumstances enforce a contract to make a will or to make a certain testamentary disposition; and this may be done even when the agreement was parol where, in reliance upon the contract, the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud on him. The relief is granted not by ordering a will made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promissor as impressed with a trust in favor of the plaintiff and by compelling the defendant, who must belong to some one of these classes of persons, to make such disposition or conveyance of the property as will carry out the intent of the agreement." A man might renounce every power, benefit, or right which the law gives him, and he will be bound by his agreement to do so provided the agreement be entered into fairly, without surprise, imposition, or fraud,

and that it be reasonable and moral. *Rivers* v. *Executors of Rivers,* 3 Desaus. Eq. (S. Car.) 195 (1811).

2. *The Consideration.* This in the typical case is the care and protection of the testator till his death and the services incident thereto. The argument is usually advanced that the plaintiff can be compensated for his services in money, and so the decree should not be granted, but the plaintiff be left to his remedy on a *quantum meruit.* But it can be answered, and is so answered in the cases on the subject, that, first, it was not the intention of the parties to the contract that the services of the plaintiff, or the consideration for the promise, should be compensated in money; and, secondly, that it is impossible to estimate the value of such services by a pecuniary standard. In *Brinton* v. *Van Cott,* 8 Utah, 33 (1892), a similar case, it is said: "The services rendered were of such a peculiar character that it would be exceedingly difficult and probably impossible to estimate their value to the deceased by any pecuniary standard. It was not the intention to measure such services by a pecuniary standard." Again, in *Burns* v. *Smith,* 53 Pac. 742 (1898): "Parties cannot be put in statu quo. The disposition claimed is carrying out the cherished intention of the deceased in relation to the plaintiff. In the very nature of things, nine years in the life of a child so change conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and courts therefore compel them to stand upon and abide by the record they have made."

But it must be further considered that if the consideration be slight, so as to make the contract apparently unfair, specific performance will be denied, for to entitle one to such a decree the contract must be fair, just, and equitable in all its parts. The consideration must be deemed adequate by the court. This is strongly upheld in *Woods* v. *Evans,* 113 Ill. 188 (1885). There the plaintiff was an infant orphan—inmate of a charitable organization. Short, a married man possessed of property worth $20,000, with the consent of the institution contracted with the plaintiff that if she would enter his service and live with him till she should become eighteen (a period of seven years), and during all that time faithfully serve and obey him as a good, orderly servant and as a dutiful child should, he, in consideration thereof, undertook to take her from the institution, adopt her in his family, support, maintain, and educate her, and leave her at his death a child's share of his estate. The court in its opinion says: "The services agreed to be rendered here could in no sense be regarded as equivalent for the property agreed to be given. It is plain to any person of ordinary intelligence that the support and education would fully compensate

the plaintiff for all the services agreed to be rendered, but, notwithstanding this, if a specific performance of the contract set out in the bill should be decreed, she will receive in addition to what she has already received quite a large fortune. Under such circumstances, can the contract be regarded as fair and just in all its parts?" And on this ground, together with another ground to be considered *infra,* specific performance was denied. See also *Ikerd* v. *Beavers,* 106 Ind. 483 (1886).

3. *Terms of the contract must be definite, certain, and clearly proven.* The contract must be established by direct and positive proof and without conflicting evidence—definite as to the property to be given and the services to be rendered. And the reason for this appears in this sentence from the American and English Encyclopedia: " Parol agreements to make specific testamentary provision have been a source of difficulty to the courts. Courts listen reluctantly to verbal statements of what dead men have said." And again: " Claims of this nature against dead men's estate resting entirely on parol, based largely on loose declarations, presented in some cases years after the services were rendered and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done." *Wall's Appeal,* 111 Pa. 460 (1886). So that we see that the courts require strict proof; but when the evidence clearly establishes a plain, definite contract, and a substantial performance on the promisee's part, they will not hesitate to make the decree sought.

So a promise in consideration of service to give the plaintiff " as much as any relation on earth" or " a share with all my nephews at my last" have been considered too indefinite to be enforced. " Such claims are always dangerous, and when they rest on parol evidence they should be strictly scanned. Especially when an attempt is made under cover of a parol contract to effect a distribution different from that which the law makes or that which decedent has directed by his will, should it meet with no favor in a court of law. Even if any such contract may be in force, it can only be when it is clearly proved by direct and positive testimony and when its terms are definite and certain." *Graham* v. *Graham's Executors,* 34 Pa. 475 (1859).

So " if you will move to my farm and take care of and support me during my lifetime, I will convey to you in a reasonable time a certain piece of land" has been likewise held too indefinite and unfair, as the quality of support to be furnished is wholly in the discretion of the plaintiff. *Ikerd* v. *Beavers* (*supra*).

Nor is this sufficiently definite: " Don't be discouraged; you shall be paid for all your hard work. I will leave you this place." *Bash* v. *Bash,* 9 Pa. 260 (1848). Moreover, in that

case it is said, "It is error to instruct the jury that it is sufficient if the evidence is clear and satisfactory—it must be *direct and positive.*"

Courts have refused to enforce a contract of this kind, "I will provide for you so that you will never want during your life," for it can be seen at a glance that this is hopelessly uncertain. *Wall's Appeal* (*supra*). But a contract to devise "a child's share" is sufficiently certain. *Healy* v. *Simpson,* 113 Mo. 340 (1892).

As to proof of the contract, the testimony of two witnesses that the testatrix promised to remember the plaintiff in her will and to provide for her when she died in consideration of certain household services has been held insufficient to establish a contract to make a will in favor of the plaintiff. *Newton's Executors* v. *Field,* 98 Ky. 186 (1895).

4. *The applicability of the Statute of Frauds to such contracts.* These contracts being such as relate to the transfer of land, naturally the point is raised that the contract is within the Statute of Frauds, which requires such contracts to be in writing, and that, resting entirely on parol evidence, they cannot be enforced. While most of the courts seem to consider the contract one to which the statute is applicable (see *Alerding* v. *Allison,* 68 N. E. 185, a very recent decision), yet they get around this difficulty on the ground that the services having been rendered when the suit is brought, there has been such a part performance as to take the contract out of the working of the statute, for in most of these cases the plaintiff's part is substantially performed and all that remains to be done is the defendant's obligation—viz., to make the transfer.

"An agreement by a man and wife to adopt the plaintiff as their child and provide and care for her and leave her their property at their death is taken out of the operation of the Statute of Frauds when the plaintiff has fully performed the contract on her part by living with and obeying them as parents and paying them her wages." *Sharkey* v. *McDermott,* 91 Mo. 647 (1887), following *Wright* v. *Tinsley,* 30 Mo. 389 (1860). Accord, *Brown* v. *Sutton,* 129 U. S. 238 (1889). Contra, *Wallace* v. *Long,* 105 Ind. 525 (1886), where the plaintiff was left to his remedy on a *quantum meruit.*

5. *Contract must not interfere with rights of innocent third parties.* This proposition is supported by the case of *Owens* v. *McNally,* 113 Cal. 444 (1896). There the plaintiff agreed to leave her home and accompany the defendant to California and live with him and care for him, he to will her his property. Subsequent to the agreement he married. After remarking that the contract was rather vague and uncertain the court continued: "The complainant has a right to the protection of this

court and its aid in protecting her rights, but if that protection and aid cannot be afforded him without invading and disregarding the rights of others, this court may not, in its anxiety and desire to relieve one party, inflict a wrong and injury upon another entirely innocent in the transaction." The widow was ignorant of the contract till the death of her husband and so her rights cannot be swept aside, but the plaintiff will be relegated to a *quantum meruit.* This is analogous to the revocation of a will by change of the testator's circumstances.

"Courts will not enforce the specific performance of a contract at the instance of a vendor where his title is involved in difficulties which cannot be removed or where it would not be equitable to make such a decree." This applies to a contract to devise land as well as a contract to sell land. *Johnson* v. *Hubbell* (*supra*).

It would perhaps be proper, at this time, to make clear on just what grounds the relief desired in such a case is granted. It is succinctly stated as follows: "The general principle to be extracted from the authorities is that if the plaintiff with the knowledge and consent of the promissor does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relation of the parties as to render a restoration of their former condition impracticable, it is a *virtual fraud* upon the part of the promissor to set up the statute in defence and thus to receive to himself the benefit of acts done by the plaintiff, while the latter is left to the chance of a suit at law for reimbursement for the value of his outlays, or to an action on a *quantum meruit* for the value of his services." *Townsend* v. *Vanderwerkes,* 160 U. S. 171 (1895).

The above-mentioned points are those usually raised and discussed in a case of such a nature, and as in the case at hand all such conditions were satisfied, the contract being fair, certain, and clearly proven, with the rights of no innocent third parties intervening and the plaintiff having substantially performed his part, the decree was rightly granted. The case is undoubted law and would be followed in nearly all jurisdictions. There are some seemingly discordant cases which have been cited as conflicting with the principle laid down in this case, but these can mostly be distinguished as not complying with all of the above conditions.

*Cox* v. *Cox,* 26 Grattan (Va.) 305 (1875), is distinguishable, as there the plaintiff died before the defendant and so did not complete his part of the contract, which required services until the defendant's death.

The judge in *Sprunkle* v. *Hayworth,* 26 Grattan, 384 (1875), seemed to see several difficulties: 1. That a written instrument cannot be varied by parol. But this is misconceived, as the

evidence was not to vary the will but to establish an independent contract. The will is subject to all contracts and liabilities of the testator before made, and in proving them you cannot be said to be varying the will. 2. That it would be allowing parol wills. This will hardly hold water, as it is a distinct contract and not a will that is being established.

Where the defendant becomes insane, naturally he could not make the desired will, and so the plaintiff should be restricted to a *quantum meruit*. *Hudson* v. *Hudson*, 87 Ga. 678 (1891).

*Maddison* v. *Alderson*, L. R. 8 Ap. Cas. 467 (1883), frequently cited, does not conflict, as the Court there says, "I do not see that we have before us that certain proof of the agreement which authorities appear to require." It was a case, as they styled it, of "vague anticipation."

A minor point was raised and decided in the case in hand. The administrator of Healy was not a party to the suit and it was objected to on that ground. The Code of Civil Procedure provided, "Any person may be made a defendant who has a claim or interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination of the question involved therein." Necessary parties are those without whom a valid decree cannot be made, so that clearly the administrator was not needed. He had no interest therein—the question being wholly between the heirs. The administrator in such a case is a mere stakeholder. His duty is to preserve the estate and distribute it as the court directs. Accord, *Roach* v. *Coffey*, 73 Cal. 281 (1887).

And following this decision the court have no difficulty in allowing the attorney for the administrator to appear for the plaintiff, which would not be allowed if the administrator were an adverse party to the suit.

*F. G. S.*